

Trusts and Estates Law: Fiduciary and Estate Liability in Contract and in Tort

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COMMENTS

FIDUCIARY AND ESTATE LIABILITY IN CONTRACT AND IN TORT

For many individuals, designation as a trustee or personal representative is a welcome occasion, for it is considered to be an honor as well as a source of compensation. However, what many fiduciaries¹ do not realize is the fact that they are subjecting themselves to possible personal liability for acts performed in the course of the administration of the estate.

Similarly, many creditors dealing with a fiduciary who represents an estate might very well cease these dealings if they knew that, upon a breach of contract on the fiduciary's part, they could be limited in obtaining satisfaction to the personal assets of the fiduciary alone.

This Comment will consider: (1) the extent to which trustees and personal representatives, acting in the course of the administration of the estate, may subject themselves to personal liability in actions based on contracts or torts; (2) the extent to which the estate may be held liable for the contracts and torts of its trustee or personal representative acting in the course of the administration of the estate; (3) the interpretation which this author believes should be given to sections 701.19(1), 701.19(11), 860.01 and 860.07 of the Wisconsin Statutes, in light of the first two points; and (4) the advisability of the use of various drafting techniques in order to protect the fiduciary and to render the estate liable for obligations properly incurred by the trustee or personal representative in the course of the administration of the estate.

I. PERSONAL LIABILITY OF FIDUCIARIES IN CONTRACT AND IN TORT

As a general rule, both trustees and personal representatives are personally liable for contracts entered into and breached in the course of the administration of the estate² unless, in the contract,

1. Throughout this article, the term "fiduciary" will be used generically for the terms "trustee" and "personal representative."

2. *Taylor v. Davis*, Adm'x, 110 U.S. 330 (1884); *Gates v. Avery*, 112 Wis. 271, 87 N.W. 1091 (1901); *McLaughlin, Adm'x v. Winner*, 63 Wis. 120, 23 N.W. 402 (1885); G. BOGERT,

it is provided that the fiduciary shall not be personally liable.³ Perhaps the leading case enunciating this rule is *Taylor v. Davis' Administratrix*.⁴ In this case, a former trustee of a land development trust had a lien imposed in his favor upon the trust property because of a debt owed him by the estate. He agreed to transfer this lien to two successor trustees in consideration of their execution of a contract in which they promised to pay the trust's debt to him out of the funds of the trust. The contract was signed by the trustees "as trustees", with no specific stipulation negating their personal liability. Five years after the promisee's death, and with the contract still unperformed, the two successor trustees executed an identical contract with the administrator of the estate of the first trustee, thereby recognizing their original obligation. Some time later the administrator brought an action in law against the trustees for breach of contract. Upon a writ of error brought to the United States Supreme Court challenging the propriety of a personal judgment against the trustees, the Court held:

We are of opinion, therefore, that the plaintiffs in error, having assumed a personal liability, the suit was well brought against them in a court of law, and that the court did not err in rendering judgment against them in their individual capacity.⁵

Undoubtedly, the most often quoted passage in this case, justifying the theory behind the rule holding a fiduciary personally liable for contracts entered into in the course of the administration of the estate, is the following:

A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his

TRUSTS AND TRUSTEES § 712 (2d ed. 1960) [hereinafter cited as BOGERT]; RESTATEMENT (SECOND) OF TRUSTS § 262 (1959) [hereinafter cited as RESTATEMENT]; A. Scott, TRUSTS § 262 (3d ed. 1967) [hereinafter cited as SCOTT]; Johnston, *Developments in Contract Liability of Trusts and Trustees*, 41 N.Y.U. L. REV. 483 (1966); Stone, *A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee*, 22 COLUM. L. REV. 527 (1922) [hereinafter cited as Stone]; 34 C.J.S. *Executors and Administrators* § 715b (1942); Annot., 139 A.L.R. 134 (1942); Annot., 138 A.L.R. 155 (1942).

3. RESTATEMENT § 263; SCOTT § 263; Annot., 139 A.L.R. 134 (1942); Annot., 138 A.L.R. 155 (1942).

4. 110 U.S. 330 (1884).

5. *Id.* at 337.

principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name of office or employment will not discharge him. Of course, when a trustee acts in good faith and for the benefit of the trust, he is entitled to indemnify himself for his engagement out of the estate in his hands, and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof.⁶

Another argument advanced to support the rule holding fiduciaries personally liable for contracts entered into in the course of the administration of the estate is that, in this fashion, the interests of the beneficiaries will be sufficiently protected. If an action could be brought in law against the fiduciary in his representative capacity and if the judgment could be satisfied out of the estate property, the beneficiaries might be held to be concluded as to the propriety and the fairness of the contract without an opportunity to be heard. It would definitely be to the fiduciary's advantage, if he entered into an imprudent contract, to cover up and to be silent as to his breach of trust. However, if the fiduciary is held personally liable, the beneficiaries would not be bound as to the legality and the prudence of the contract by any settlement or litigation between the fiduciary and the third party. In this situation, the burden is on the fiduciary, in the settlement of his accounts with the beneficiaries, to prove that the contract which he entered into was prudent and within the scope of his authority in order that he may justify his claim of indemnity from the estate for monies of his own which he spent to satisfy his contract liability.⁷

6. *Id.* at 334-35. In regard to this point, Scott has stated:

The objection to stating that the trust estate is liable is that such a mode of expression seems to personify the estate, and we have been told by Professor Hohfeld that legal relations exist only between persons and not between a person and property.

SCOTT § 263, at 2230.

7. See BOGERT § 712, at 451-52. It would appear, however, that Bogert's objection to direct action against the estate would have no solid foundation if the beneficiaries were notified of the action and were permitted to intervene in order to object to the propriety of the fiduciary's contract.

Wisconsin has adopted the majority rule holding both trustees and personal representatives personally liable for contracts entered into in the course of the administration of the estate. In *Gates v. Avery*,⁸ the Wisconsin Supreme Court considered the question as to whether or not a beneficiary of a trust was liable on a contract made by his trustee "as trustee." The court held:

The nonsuit was based upon a failure of the proof to connect the defendant with the transaction set out in the complaint. The contract and deed put in evidence show a transaction with Parmly as trustee, but none of the beneficiaries are named in the instruments. No contract relation between plaintiff and defendant was shown. The subsequent declaration of trust executed by Parmly did not change the contract he had made, or create a contract between the parties to this suit. The trustee was not an agent. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. He holds the estate to manage and control, and is personally bound by the contracts he makes, even when designating himself as "trustee."⁹

Similarly, in *McLaughlin v. Winner*,¹⁰ an action brought by an administratrix to recover the value of goods sold by the administratrix to the defendant and also an action in which the defendant counterclaimed against the administratrix for the value of services rendered by him at the administratrix's request, the court held that a personal representative is personally liable on contracts made by him in the course of the administration of the estate:

It is a general rule that upon all contracts made by an executor or administrator, in the discharge of his duties as such, he is liable personally, and his liability does not depend upon the fact that he has assets in his hands sufficient to discharge the debts

8. 112 Wis. 271, 87 N.W. 1091 (1901).

9. *Id.* at 276-77, 87 N.W. at 1093. It can be argued that a fiduciary's signing of a contract "as trustee" would not negate his personal liability in light of the Wisconsin Supreme Court's holding in *Wisconsin Trust Co. v. Chapman*, 121 Wis. 479, 99 N.W. 341 (1904). In this case, pursuant to statutory authority, the probate court authorized the defendant administrator to borrow money upon notes secured by the real estate of the decedent and thereby to pay the debts of the decedent. The court held that the administrator signed in a manner which negated his personal liability although he merely signed the note as: "I, Oscar H. Pierce, administrator of the estate of Sherburn Bryant, deceased." Because of its holding, the court felt that the administrator's prayer for reformation of the mortgage in order to insert an express stipulation against personal liability, as he alleged was agreed upon between him and the mortgagee, was not necessary.

10. 63 Wis. 120, 23 N.W. 402 (1885).

so incurred; and the judgment, if any be recovered, is to be satisfied out of his estate, and not out of the estate of the deceased. There are, undoubtedly, exceptions to the general rule, but they depend upon equitable considerations, which clearly show that the estate in the hands of the executor or administrator ought to be charged with the payment of the claim rather than the property of the executor or administrator.¹¹

Besides being personally liable for contracts entered into the course of the administration of the estate, it is well settled that a fiduciary is also personally liable for torts committed by him in the course of the administration of the estate.¹² This personal tort liability of the fiduciary is primarily based upon the estate's not being a legal entity, and also upon the principle that a fiduciary may not impair the monetary interests of the beneficiaries of the estate by his tortious acts:

The law will not allow trust property to be impaired or dissipated through the negligence or improvidence of trustees The beneficial interest thereof belongs to the cestuis, and it must be held intact for them.¹³

In *Johnston v. Long*,¹⁴ the defendant executor appealed from a judgment entered in favor of the plaintiff in the sum of \$87,575 for personal injuries sustained by the plaintiff when an overhead door fell upon him as he was entering a garage which was part of the estate of the decedent. The California court reiterated the general rule that an executor is "liable for any torts committed by him in the administration of the estate."¹⁵ The court went on to state:

If the plaintiff could recover directly from the estate in an action against the executor in his representative capacity, the heirs would have no assurance that the question of the personal fault of the executor would be properly tried. It would not be to the interest of either the plaintiff, who would be attempting to recover out of the assets of the estate, or the defendant, whose interest as an individual and as an executor would be in conflict

11. *Id.* at 128-29, 23 N.W. at 406.

12. *Johnston v. Long*, 30 Cal. 2d 54, 181 P.2d 645 (1947); *Massey v. Payne*, 109 W. Va. 529, 155 S.E. 658 (1930); RESTATEMENT § 264; SCOTT § 264; Stone 527; 34 C.J.S. *Executors and Administrators* § 716a (1942); Annot., 127 A.L.R. 687 (1940); Annot., 44 A.L.R. 637 (1926).

13. *Parmenter v. Barstow*, 22 R.I. 245, 247, 47 A. 365, 366 (1900).

14. 30 Cal. 2d 54, 181 P.2d 645 (1947).

15. *Id.* at ____, 181 P.2d at 648.

. . . to show personal fault on the part of the executor. Under the general rule that an executor is personally liable for the torts committed by him or his agents in the course of administration, the plaintiff may recover a judgment against the executor personally and the question of the executor's fault is determined in the probate court, where the interest of the heirs may properly be protected.¹⁶

Although the Wisconsin Supreme Court has apparently never spoken for or against holding a trustee or a personal representative personally liable for torts committed in administering the estate, in *Whitford v. Moehlenpah*,¹⁷ the court recognized the possibility of finding personal liability.

II. LIABILITY OF THE ESTATE

Looking at the fact of the fiduciary's personal liability upon a breach of contract or for a tort strictly from the claimant's standpoint, it must be recognized that the claimant can obtain complete satisfaction only when the fiduciary is sufficiently solvent and subject to service. However, what of the situation in which the fiduciary is insolvent or not subject to service? Is the claimant to be without a satisfactory remedy merely because he cannot obtain "personal" satisfaction from the fiduciary who acted in the course of the administration of the estate?

The *Restatement (Second) of Trusts* lists five situations in which a claimant has a right to reach the assets of the estate for contractual and tort¹⁸ obligations incurred by the fiduciary in his administration. The theory behind these five situations is equally applicable to personal representatives as well.

A. Reaching Trust Property Where Trustee is Entitled to Exoneration

If a person to whom the trustee has become personally liable in the course of the administration of the trust cannot obtain satisfaction of his claim out of the trustee's individual property, he can by a proceeding in equity reach trust property and apply it

16. *Id.* at ____, 181 P.2d at 651 (citations omitted).

17. 196 Wis. 10, 23, 219 N.W. 361, 365 (1928).

18. One of these five situations, namely section 271, deals only with a contractual obligation.

to the satisfaction of his claim to the extent to which the trustee is entitled to exoneration out of the trust estate.¹⁹

Although the *Restatement* indicates that the rule found in this section is primarily applicable where the fiduciary is found to be insolvent or where he cannot be subjected to the jurisdiction of the court,²⁰ not all jurisdictions have required the creditor to exhaust his legal remedies against the fiduciary before he has been allowed to bring his claim against the estate based upon the fiduciary's right to exoneration.²¹ The fiduciary's right to exoneration, or indemnity as it is sometimes called, is not an absolute right, but one dependent upon the fulfillment of two conditions. First, the obligation incurred by the fiduciary, either in contract or in tort, must be one incurred in the proper administration of the estate. Accordingly, if the obligation is in tort, the fiduciary must be without personal fault. Second, the fiduciary must not be in arrears in his accounts to the estate.²² On this last point, if, for example, the fiduciary has committed a breach of trust making him personally liable to restore to the estate an amount which equals or exceeds the amount of the creditor's claim, the creditor cannot reach the assets of the estate. Accordingly, if the amount which the fiduciary is obligated to restore to the estate is less than the amount of the liability properly incurred by him to the creditor, the creditor can reach the assets of the estate only to the extent of the difference.²³

Obviously, the determination of the above two conditions directly affects the beneficiaries, since the question of their possible economic loss, in having the creditor's claim paid out of their shares in the estate, depends upon it. Thus, the beneficiaries should have the right to intervene if they feel that the fiduciary is not entitled to indemnity. It appears that intervention on the part of the beneficiaries would be necessary if, in fact, the fiduciary were not entitled to indemnity since it would always be to the fiduciary's interest to attempt to establish that he properly incurred the obli-

19. RESTATEMENT § 268. See also cases cited in § 268 of the Appendix to the RESTATEMENT.

20. RESTATEMENT § 268, comments *b* & *c* at 15.

21. Stone 540.

22. Restatement § 268, comments *d* & *e* at 15-16. See also Fulda & Pound, *Tort Liability of Trusts*, 41 COLUM. L. REV. 1332, 1346 (1941). A fiduciary is not personally at fault, for indemnity purposes, for a tort committed by an agent properly employed by the fiduciary in the administration of the estate. SCOTT § 264, at 2164.

23. RESTATEMENT § 268, comment *e* at 16.

gation in the course of the administration of the estate. The Uniform Trusts Act, adopted by only a small fraction of the jurisdictions across the country,²⁴ provides for direct action by contract and tort creditors against the fiduciary in his representative capacity.²⁵ However, it is required that the plaintiff notify each of the beneficiaries of the existence and nature of the action in order that they may effectively intervene.²⁶

B. Reaching Trust Property Where Trust Estate Benefitted

A person who has conferred a benefit on the trust estate and cannot obtain satisfaction of his claim out of the trustee's individual property can by a proceeding in equity reach trust property and apply it to the satisfaction of his claim to the extent to which the trust estate has been benefitted, unless under the circumstances it is inequitable to allow him such a remedy.²⁷

The remedy under this section can be independent of the remedy found under section 268 *supra*, since there could occur numerous situations in which the estate has received a benefit because of a contract entered into by its fiduciary while, at the same time, the fiduciary is not entitled to indemnity.²⁸ For example, as the first illustration under this section of the *Restatement* indicates:

1. *A* devises Blackacre to *B* in trust. *B* misappropriates rents amounting to \$1,000.00. *B* is not empowered to borrow money for the trust. *B* borrows \$500.00 from *C* for the purpose of paying taxes on Blackacre and the money lent is so applied. *B* is insolvent. *C* brings a suit in equity against *B* as trustee to recover \$500.00 from the trust property. *C* is entitled to recover.

Wisconsin, long ago, in *Miller v. Tracy*,²⁹ recognized the rule stated in this section of the *Restatement*. This action was brought to recover monies in the sum of \$552 owing to the plaintiff for services rendered and disbursements made in successfully defend-

24. As of 1966, five states (Nevada, New Mexico, North Carolina, Oklahoma, and South Dakota) had adopted the Act.

25. UNIFORM TRUSTS ACT §§ 14-15.

26. *Id.*

27. RESTATEMENT § 269. See also cases cited in § 269 of the Appendix to the RESTATEMENT.

28. As in the case of the indemnity remedy, § 268, not all jurisdictions require that the creditor exhaust his remedies against the fiduciary before he is allowed to proceed against the estate under the rule found in this section. See Stone 540.

29. 86 Wis. 330, 56 N.W. 886 (1893).

ing a claim against the estate in the sum of \$11,000. In deciding upon this claim brought against the estate of the decedent, the court stated:

In *McLaughlin v. Winner*, 63 Wis. 128, it was held that "it is the general rule that upon all contracts made by an executor or administrator in the discharge of his duties as such he is liable personally, and his liability does not depend upon the fact that he has assets in his hands sufficient to discharge the debts so incurred; and the judgment recovered is to be satisfied out of his estate, and not out of the estate of the deceased." That is to say, that the creditor in such case cannot, save in exceptional circumstances, have his claim allowed directly to him against and paid out of the estate. But where the estate has derived a benefit from the services rendered to the administrator, and he is unable to pay or is insolvent, the creditor has been allowed to prove and proceed directly against the estate.³⁰

The New York intermediate appellate court, in *Scheibeler v. Albee*,³¹ also recognized reaching the assets of the estate under what may be called this "unjust enrichment" theory. In that case, the defendants, trustees and executors of an estate, contracted to sell property to the plaintiff's assignor and to give good title thereto. The assignor deposited \$1,000. Upon the defendants' inability to give good title, the plaintiff, without showing the insolvency of the personal representatives, sued them in their representative capacity for the \$1,000 down payment and also for \$500 in damages. Upon the defendants' challenge to the suit brought against them in their representative capacity, the court held:

The \$1,000.00 was lawfully received by the defendants in their representative capacity in dealing concerning the property of the testator The defendants having received the money in their representative capacity, an action can be maintained against them in that same capacity for its recovery.³²

30. *Id.* at 333-34, 56 N.W. at 867-68. Reference should also be made to estate of Sheldon, 249 Wis. 430, 24 N.W.2d 875 (1946). In that case, the decedent died leaving his brother and a niece as his only heirs at law. The brother was appointed administrator. He then filed a claim against the estate to which the niece objected. She employed counsel to contest the claim with the result being that the court allowed the administrator only \$390.95 of his claim for \$1,120.00. The niece then filed a claim against the estate for the attorney fees. The administrator objected. The court allowed the claim against the estate based on the unjust enrichment theory.

31. 114 App. Div. 146, 99 N.Y.S. 706 (1906).

32. *Id.* at 147, 99 N.Y.S. at 707.

An important point to note in the court's decision is that the court would not allow the recovery of the \$500 in damages from the estate since this was held to be an individual liability of the fiduciaries and not an unjust enrichment of the estate.

C. Where the Terms of the Trust Provide for Liability of the Estate

Persons to whom the trustee has incurred a liability in the administration of the trust can by a proceeding in equity reach trust property and apply it to the satisfaction of their claims, if by the terms of the trust the settlor manifested an intention to confer such a power upon them.³³

The remedy under this section is available although the fiduciary is not entitled to indemnity and, thus, the creditor is precluded from proceeding under the rule stated in section 268. Similarly, the remedy under this section is available although no benefit has been conferred on the estate and, thus, the creditor is precluded from reaching the assets of the estate under the rule stated in section 269.

Comment *b* to this section of the *Restatement* indicates that the fiduciary exoneration clause, found in many trust documents and wills, is applicable under this section in order to render the estate liable for the contracts and torts of its fiduciary.³⁴ The mere existence of this clause, however, according to some case law, is not enough to establish the liability of the estate in actions founded upon a contract. These cases have held that a promisee must have had actual or constructive notice of trust provisions negating the personal liability of the fiduciary for contracts entered into in the course of the administration of the estate before he will be able to proceed directly against the assets of the estate.³⁵ The basic theory

33. RESTATEMENT § 270. See also cases cited in § 270 of the Appendix to the RESTATEMENT.

34. On the other hand, a provision in the trust instrument that the trustee shall not be personally liable for expenses incurred in the administration of the trust is ordinarily interpreted as manifesting an intention to confer upon creditors a power to reach the trust estate.

RESTATEMENT § 270, comment *b* at 21.

35. *James Stewart & Co. v. National Shawmut Bank*, 75 F.2d 148 (1st Cir. 1935); *East River Sav. Bank v. 245 Broadway Corp.*, 284 N.Y. 470, 31 N.E.2d 906 (1940); *Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Wallace*, 346 Pa. 532, 31 A.2d 71 (1943). Scott says:

Such a provision in the trust instrument, however, does not of itself preclude the

behind such holdings is that the parties must intend that the estate, and not the fiduciary, is to be liable on the contract³⁶ before the courts will give effect to this provision.

It is further indicated in comment *b* that if a trust is created in order to carry on the business of the settlor, an intention of the settlor can be inferred to subject the assets of the estate employed in the business to the payment of liabilities incurred by the fiduciary in carrying on the business.³⁷ In fact, the settlor may indicate his intention to subject the entire estate property, and not merely the property employed in the business, to the payment of such liabilities.³⁸ *Ernest G. Beaudry, Inc. v. Freeman*³⁹ was a case which applied this "business trust" theory to a situation concerning a personal representative. This case dealt with a personal injury suffered by the plaintiff when he was struck by a metal sign blown off the premises rented by the decedent. The executor was in possession of the premises and conducting the business of the decedent when the sign struck the plaintiff. The court held in this suit brought against the representative in his representative capacity:

[I]t is the general rule that a representative of the estate is not liable in his representative capacity for a tortious act committed by him unless the estate which he represents receives a pecuniary benefit therefrom. This general rule applies only where one is acting in his representative capacity in the administration and distribution of estates under the general law and where no duty or right of control over the property is vested in him beyond his mere representative power Under the doctrine announced in the decision cited under this division, there is no doubt in our minds but that under the testamentary scheme the First National Bank as executor and trustee of Ernest G. Beaudry was liable to the plaintiff for the injuries inflicted by its tortious act in its representative and not individual capacity. And the plaintiff had a right of action against the estate for which the executor and trustee was liable in his representative capacity.⁴⁰

trustee from being personally liable But where the other party to the contract has notice of the provision, it may be considered with other facts in determining whether it was the understanding of the parties to the contract that the trustee should not be personally liable.

SCOTT § 263.2, at 2235.

36. See Annot., 138 A.L.R. 155, 160 (1942).

37. RESTATEMENT § 270, comment *b* at 21.

38. *Id.*

39. 73 Ga. 736, 38 S.E.2d 40 (1946).

40. *Id.* at —, 38 S.E.2d at 46.

D. *Where Contract Binds the Trust Estate*

If the trustee makes a contract with a third person and the contract provides that the trustee shall not be personally liable on the contract but that the third person shall look only to the trust estate, the third person can by a proceeding in equity reach trust property and apply it to the satisfaction of his claim upon the contract, provided that the contract was properly made by the trustee in the administration of the trust.⁴¹

Under the rule stated in this section, as was also noted under the rule found in section 268 *supra*, situations might exist in which the fiduciary did not enter into the contract in the proper administration of the estate and, thus, the beneficiaries might have to intervene in the suit brought against the representative in his representative capacity in order to prove this point.

Some courts have taken the position that the effect of a contract providing for the estate's liability merely exempts the fiduciary's individual property from liability. Under this theory, the creditor can reach the assets of the estate only to the extent that the fiduciary is entitled to indemnity from the estate.⁴² The *Restatement*, however, has taken the position that such a contract gives to the creditor a direct claim against the assets of the estate, available even though the fiduciary is in arrears in his accounts and, thus, the creditor is precluded from proceeding against the estate under the rule stated in section 268.⁴³ Some criticism has been directed at the logic of both of the above two theories. As to the indemnity theory, it has been argued that a fiduciary's right to indemnity comes into existence only at the time he expends his own funds for the benefit of the estate. Accordingly, where he has not made such an expenditure, it has been maintained that the promisee has no derivative claim at all.⁴⁴ As to the direct action theory, which does not permit setoffs if the fiduciary is in arrears in his accounts, it has been questioned why, as a matter of policy, the fiduciary should be permitted simultaneously to relieve his individual liability and to impose on the estate a greater liability than

41. RESTATEMENT § 271. See also cases cited in § 271 of the Appendix to the RESTATEMENT.

42. See SCOTT § 271, at 2284.

43. RESTATEMENT § 271, comment c at 22-23.

44. Johnston, *Developments in Contract Liability of Trusts and Trustees*, 41 N.Y.U. L. REV. 483, 498 (1966).

would be present under the indemnity theory if the policy behind the personal liability rule for fiduciaries is to protect the beneficiaries.⁴⁵ ○

E. Other Situations Where It Is Equitable to Permit Satisfaction Out of the Trust Estate

A person to whom the trustee has incurred a liability in the course of the administration of the trust may be permitted to obtain satisfaction of his claim out of the trust estate if it is equitable to permit him to do so, although his claim does not fall within the rules stated in Sections 268-271.⁴⁶

Although the *Restatement* does not cite any cases to support section 271A, which it calls the "modern trend" regarding the question of reaching the assets of the estate, it can be argued that the Wisconsin Supreme Court, although sometimes speaking in broad language, has recognized the soundness of the rule found in this section. As was previously mentioned, in *McLaughlin v. Winner*,⁴⁷ the court indicated that although the fiduciary is generally personally liable for contracts entered into "in the discharge of his duties,"⁴⁸

[t]here are, undoubtedly, exceptions to the general rule, but they depend upon equitable considerations which clearly show that the estate in the hands of the executor or administrator ought to be charged with the payment of the claim rather than the property of the executor or administrator.⁴⁹

In *Estate of Arneberg*,⁵⁰ it was recognized that the "insolvency or financial inability" of the fiduciary to satisfy the contract creditor is an equitable consideration which justifies the creditor's reaching the assets of the estate.⁵¹ In other words, the court indicated that when "it is necessary" for the creditor's protection, his claim will be satisfied from the assets of the estate.⁵² In *Juergens v. Ritter*,⁵³

45. *Id.*

46. RESTATEMENT § 271A.

47. 63 Wis. 120, 23 N.W. 402 (1885).

48. *Id.* at 128, 23 N.W. at 406.

49. *Id.* at 129, 23 N.W. at 406.

50. 184 Wis. 570, 200 N.W. 557 (1924).

51. *Id.* at 574, 200 N.W. at 558.

52. *Id.*

53. 227 Wis. 480, 279 N.W. 51 (1938).

however, the court recognized that there may very well be other "equitable considerations or exceptional circumstances" besides the insolvency of the fiduciary which would justify the creditor's reaching the assets of the estate:

Under our law an attorney for an executor or administrator may not file a claim for his fee against an estate in the absence of showing that the executor is insolvent or unless there exist some equitable considerations or exceptional circumstances.⁵⁴

On the basis of the above cases, it can be argued that Wisconsin has taken the enlightened position that whenever a fiduciary, in the proper administration of the estate, has individually incurred an obligation in contract, and the fiduciary is himself unable to pay this obligation, or when, in fact, other equitable considerations or exceptional circumstances exist, the assets of the estate should be made available to the creditor. This is so regardless of the amount, if any, of indemnity to which the fiduciary is entitled, the extent, if any, to which the estate has been benefitted, and the existence of a settlor's or testator's intent to make the assets of the estate liable for the obligations incurred by its fiduciaries. This Wisconsin position is consistent with the "economic risk theory" which holds that an economic entity, such as an estate, should bear the expenses incident to its existence:

This theory of liability of the trust estate for its expenses through the exercise of the trustee's power to appropriate trust property for that purpose thus affords a harmonious and consistent scheme for imposing on the trust estate those economic burdens which are incidental to its proper administration.⁵⁵

It is submitted that this suggested position should not be limited to situations in which the fiduciary contracts in the proper administration of the estate but, rather, this position should also be extended to the tort obligations incurred by the fiduciary in the course of the proper administration of the estate, at least where the fiduciary is not himself guilty of an intentional or grossly negligent tort. Support for this proposition can be obtained from the fact that both the economic risk theory⁵⁶ and the *Restatement*, in the situations discussed in which the creditor could reach the assets of

54. *Id.* at 488, 279 N.W. at 55.

55. Stone 539.

56. *Id.* at 542-43.

the estate, generally treat alike those contractual and tort obligations incurred by the fiduciary in the proper administration of the estate.

As a final point, it should be noted that the suggested rule under the last cited Wisconsin cases, apparently dealing with obligations incurred by the fiduciary in the proper administration of the estate, is arguably not the rule to be followed when the fiduciary incurs an obligation not in the proper administration of the estate. It would appear that a creditor proceeding under either the unjust enrichment theory (section 269) or under a broad fiduciary exoneration clause (section 270) would be able, in Wisconsin, to make a strong argument for recovery from the estate even though the obligation was not incurred by the fiduciary in the proper administration of the estate.

III. THE NEW WISCONSIN STATUTES

Sections 701.19(1) and 701.19(11), dealing with trustees, became effective July 1, 1971, while sections 860.01 and 860.07, dealing with personal representatives, became effective April 1, 1971.⁵⁷

57. WIS. STAT. § 701.19 (1969):

Powers of Trustees. (1) Power to Sell, Mortgage or Lease. In the absence of contrary or limiting provisions in the creating instrument, in the court order appointing a trustee or in a subsequent order, a trustee has complete power to sell, mortgage or lease trust property without notice, hearing or order. A trustee has no power to give warranties in a sale, mortgage or lease which are binding on himself personally. In this section "sale" includes an option or agreement to transfer for cash or on credit, exchange, partition or settlement of a title dispute; this definition is intended to broaden rather than limit the meaning of "sale." "Mortgage" means any agreement or arrangement in which trust property is used as security.

. . . .

(11) Protection of Third Parties. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.

WIS STAT. § 860.01 (1969):

Power of personal representative to sell, mortgage and lease. A personal representative to whom letters have been issued by the probate court and whose letters have not been revoked has complete power to sell, mortgage or lease any property in the estate without notice, hearing or court order. The rights and title of any purchaser, mortgagee or lessee from the personal representative are in no way affected by any

At this time, attention is directed, in chief, to the changes which these statutes have made in regard to the Wisconsin position as to the fiduciary's and the estate's liability for contracts entered into by the fiduciary in behalf of the estate.

Although sections 701.19(1) and 860.01 give to a trustee and a personal representative the authority to sell, mortgage, and lease the property of the estate, the granting of this power does not, in and of itself, change the Wisconsin rule holding a fiduciary personally liable for contracts entered into in behalf of the estate. The validity of this conclusion can be seen if one merely recognizes the fact that the fiduciary personal liability rule has generally been applied to situations in which a fiduciary was authorized to enter into the contract which resulted in his personal liability.⁵⁸ The Wisconsin legislature has, however, seen fit to dictate in sections 701.19(1) and 860.07 respectively, that neither trustees nor personal representatives have the power to give warranties in the selling, mortgaging, or leasing of the property of the estate which are binding upon themselves personally. An encyclopedic definition of "warranty" has been adopted by the Wisconsin Supreme Court:

"A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended to relieve the promisee of any duty to ascertain the fact for himself, and amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue" 17A C.J.S., *Contracts*, p. 325, sec. 342.⁵⁹

Although this Comment is not intended to discuss the vast number of possible warranties and the nature of the same which could be applicable in the selling, mortgaging, or leasing of the property of an estate,⁶⁰ it should be noted that the common law principles of

provision in a will of the decedent or any procedural irregularity or jurisdictional defect in the administration of the decedent's estate. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by the personal representative.

WIS. STAT. § 860.07 (1969):

No warranties. Except as under s. 860.09(2), a personal representative has no power to give warranties in any sale, mortgage or lease of property which are binding on himself personally or on the estate of the decedent.

58. See part I of this Comment *supra*.

59. *Dittman v. Nagel*, 43 Wis. 2d 155, 160, 168 N.W.2d 190, 193 (1969).

60. For a rather thorough enumeration of the numerous types of warranties which could exist in a contract to sell, mortgage, or lease property, see 44A WORDS AND PHRASES *Warrant* 583 (1962).

warranty, and these only, apply when real property is involved. There are special warranty provisions which are included in the Uniform Sales Act and the Uniform Commercial Code which are specifically applicable only to the sale of "goods," with realty not being included in the definition of goods.⁶¹ Therefore, sections 701.19(1) and 860.07, in regard to warranties executed by a fiduciary in the selling, mortgaging, and leasing of the property of the estate, have negated the Wisconsin rule holding fiduciaries personally liable for contracts entered into in behalf of the estate.⁶² There will be, however, many "non-warranty" situations in the selling, mortgaging, and leasing of the property of the estate in which the Wisconsin personal liability rule will still stand. For example, a fiduciary with the power to mortgage will normally be personally liable on the covenant to pay in the mortgage in the absence of language in the mortgage relieving him from personal liability.⁶³ Also, a fiduciary can be held personally liable both to a real estate broker⁶⁴ and to a purchaser⁶⁵ where he contracts to sell the property of the estate and he subsequently defaults on the obligation to convey.

Attention is now directed to the question of when the estate may be held liable for a breached contract to sell, mortgage, or lease the property of the estate.

As in the case of the fiduciary's personal liability, the mere granting to the fiduciary of the authority to sell, mortgage, and lease the property of the estate does not per se change the Wisconsin rule concerning the situations in which a creditor may reach the assets of the estate for a contractual obligation incurred by its fiduciary. This conclusion is supported by the fact that the creditor's reaching of the assets of the estate has normally been applied to situations in which the fiduciary was authorized to enter into the contract which resulted in the obligation for which the estate was held liable.⁶⁶ Accordingly, it was previously stated that it can be argued that Wisconsin has taken the position that whenever a

61. *Dittman v. Nagel*, 43 Wis. 2d 155, 161, 168 N.W.2d 190, 193 (1969).

62. A breach of warranty being an action in contract, see *Oelwein Chemical Co. v. Baker*, 204 Iowa 66, 214 N.W. 595 (1927).

63. 90 C.J.S. Trusts § 318 (1955). The fiduciary, however, would apparently not be personally liable if he were protected by a fiduciary exoneration clause.

64. *Rosenthal v. Schwartz*, 214 Mass. 371, 101 N.E. 1070 (1913).

65. *Piff v. Berresheim*, 405 Ill. 617, 92 N.E.2d 113 (1950).

66. See part II of this Comment *supra*.

fiduciary, in the proper administration of the estate has individually incurred an obligation in contract and is himself unable to pay this obligation, or when other equitable considerations or exceptional circumstances exist, the assets of the estate should be made available to the creditor. Although reaching the estate's assets in the above situations seems conditional upon the fiduciary's incurring the obligation in the proper administration of the estate, section 701.19(11) indicates that

a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise.

Therefore, it appears as though the above-suggested Wisconsin position, as to reaching the assets of the estate, could be argued to be applicable even when the trustee does not act in the proper administration of the estate in the selling, mortgaging, or leasing of the property of the estate if the third party does not have actual knowledge of the trustee's improper administration. It would appear, however, that even where a third party had actual knowledge that a trustee was exceeding his powers in the sale, mortgage, or lease of the estate's property, an argument could be made to reach the assets of the estate in a situation in which there was a broad fiduciary exoneration clause⁶⁷ covering both obligations incurred by a fiduciary in the proper *and* in the improper administration of the estate. Similar to section 701.19(1) is section 860.01:

The rights and title of any purchaser, mortgagee or lessee from the personal representative are in no way affected by any provision in a will of the decedent or any procedural irregularity or jurisdictional defect in the administration of the decedent's estate.

It should be noted, however, that under section 860.01, no exception is made for a third party with actual knowledge of the personal representative's impropriety. A final point which should be mentioned is that section 860.07, as opposed to section 701.19(1), states that a personal representative has no power to give warranties in a sale, mortgage, or lease of the property of the deceased which are binding upon the estate. Accordingly, it appears as though this section could be construed so as to deny a creditor's plea to recover

67. RESTATEMENT § 270, comment c at 21.

from the assets of the estate for the breach of a warranty executed by a personal representative.⁶⁸ It does not, however, necessarily follow that a creditor should be denied recovery from the assets of the estate for a breach of a warranty, in a contract executed by a personal representative to sell, mortgage, or lease the property of the estate, if the estate has received a benefit which constitutes an unjust enrichment.

Therefore, the new Wisconsin statutes have made only a limited change in the Wisconsin rule as to the fiduciary's and the estate's liability for contracts entered into in behalf of the estate. It does appear, however, that these statutes do indicate that when a trustee, acting within the scope of his authority (and even outside of his authority if the third party does not have actual knowledge of this fact), or a personal representative contracts to sell, mortgage, or lease the property of the estate, the estate becomes bound on these contracts.⁶⁹ Again, an exception to the above statement will lie in the case of warranties executed by a personal representative in the selling, mortgaging, or leasing of the property of the estates.

It might seem somewhat contradictory to state, in one instance, that the fiduciary is generally personally liable on contracts to sell, mortgage, or lease the property of the estate and the estate is only liable in certain special situations, and, in another instance, that the effect of these contracts, with one exception, is to bind the estate. This apparent difficulty might best be resolved by considering the informative case of *Packard v. Kingman*.⁷⁰ This was an action for a construction of a will in which the executors were given "full power and authority to grant, alien, bargain, sell, convey, mortgage, lease and assign"⁷¹ all of the decedent's estate. In the complaint for the construction of the will, the executors stated that

68. The comment to § 860.07, as found in Wis. Laws 1969, ch. 339, states: "This section is new and its purpose is to prevent the encumbrance of other assets in an estate by warranting title to real estate sold."

69. See *Gilbert v. Penfield*, 124 Cal. 244, 56 P. 1107 (1899); *Roberts v. Hale*, 124 Iowa 296, 99 N.W. 1075 (1904); *Warren v. Pazolt*, 203 Mass. 328, 89 N.E. 381 (1909); *Packard v. Kingman*, 109 Mich. 497, 67 N.W. 551 (1896); *Columbus Land, Loan & Bldg. Ass'n v. Wolken*, 146 Neb. 684, 21 N.W.2d 418 (1946); *Tarenzi v. Maxwell*, 21 Misc. 2d 185, 190 N.Y.S.2d 727 (Sup. Ct. 1959); *Meyer v. Johnson*, 51 Wash. 2d 175, 316 P.2d 1090 (1957); *Wisconsin Trust Co. v. Chapman*, 121 Wis. 479, 99 N.W. 341 (1904).

70. 109 Mich. 497, 67 N.W. 551 (1896).

71. *Id.* at ____, 67 N.W. at 552.

they feared

it might be held that, under the language of the will, they would not have the authority and the power to bind said estate, and that the result of such acts upon their part would be to only bind and charge themselves, personally and individually, for matters in which they would have no personal interest whatever.⁷²

The court held that the provisions of the will gave the executors the power to bind the estate on contracts to sell, mortgage, and lease. In recognizing the possibility of a *breach* of contract, however, the court indicated that it was not, by holding that the executors had the power to bind the estate, doing away with the common law rule as to their personal liability for contracts entered into in the course of the administration of the estate:

While we hold that it is within the power of the executors to perform the acts mentioned, and, therefore, that the estate would be bound thereby, we do not overlook the rule that the effect of such contracts is usually to bind the trustee personally, and that the other contracting party must pursue his remedy against the trustee. This doctrine is established by a list of cases, long and generally uniform.⁷³

The court went on to indicate that the estate could be held liable if it were benefitted by the contract or if the fiduciary expressly contracted for the estate's liability.⁷⁴ Therefore, when in compliance with sections 701.19(1), 701.19(11), and 860.01, a trustee or a personal representative contracts to sell, mortgage, or lease the property of the estate, the fiduciary has the power and the duty to apply only the estate's property necessary to satisfy the terms of the contract. Accordingly, an action for specific performance will lie when he fails in the performance of this duty.⁷⁵ If, however, there is a breach of the contract, excluding a breach of warranty, the third party must obtain satisfaction from the fiduciary personally, assuming he signed in an individual capacity, unless the previously discussed theories for recovery from the assets of the estate, as a whole, are applicable. A clear illustration of this point can be seen from the fact that certain courts, including Wisconsin's, have

72. *Id.* at ____, 67 N.W. at 554.

73. *Id.* at ____, 67 N.W. at 555.

74. *Id.*

75. *Tarenzi v. Maxwell*, 21 Misc. 2d 185, 190 N.Y.S.2d 727 (Sup. Ct. 1959).

interpreted the effect of a statute empowering a personal representative to mortgage the real property of the estate so as to hold that only the real property actually mortgaged is bound thereby and that a deficiency judgment will not lie against other assets of the estate but rather against the fiduciary personally if he signed the note in an individual capacity.⁷⁶

IV. DRAFTING TECHNIQUES

The last aspect to be discussed in this paper is the advisability of the use of various drafting techniques, both to facilitate a creditor's reaching the assets of the estate and to protect the fiduciary from a personal judgment in contract or in tort which forces him to seek indemnity from a sometimes unwilling estate, or, perhaps worse than this, from an insolvent estate.

First of all, a point which cannot be overemphasized is that an attorney representing a fiduciary should see to it that all contracts executed by the fiduciary, in the administration of the estate, contain a provision to the effect that the fiduciary is not to be personally liable for a possible breach of contract but that the other party is to look solely to the estate for liability. Admittedly, such a provision would not be necessary in the case of a breach of a warranty in a contract to sell, mortgage, or lease, but the possibilities of a different type of breach of contract are numerous. Although specific authorization in the trust document or the will for the insertion of such a provision would be helpful, it does not appear that this is essential in order to permit the fiduciary to specifically negate his personal liability and to cause any possible liability to fall on the estate.⁷⁷ From a settlor's or a testator's point of view, it would likely not be harmful for him to authorize such an insertion, since it seems highly unlikely that a third party would deal to any great extent with a fiduciary if he felt that his only source of satisfaction for a possible breach of contract might be the assets of the fiduciary.

Second, it would appear advisable for an attorney representing a would-be fiduciary to attempt to have inserted in the trust document or will a provision to the effect that liabilities incurred by the

76. *Columbus Land, Loan & Bldg. Ass'n v. Wolken*, 146 Neb. 684, 21 N.W.2d 418 (1946); *Meyer v. Johnson*, 51 Wash. 2d 175, 316 P.2d 1090 (1957); *Wisconsin Trust Co. v. Chapman*, 121 Wis. 479, 99 N.W. 341 (1904).

77. *SCOTT* § 271, at 2285.

fiduciary in the course of the administration of the estate shall not become personal liabilities of the fiduciary. Such a provision would manifest an intention on the part of the settlor or testator to confer upon creditors the power to reach the assets of the estate and not the assets of the fiduciary. Accordingly, because of the manifestation of this intention, under the rule set forth in section 270 of the *Restatement*, as supplemented by the cases set forth in note 35, the creditors would be able to reach the assets of the estate and not those of the fiduciary. An exoneration clause of this type not only protects the fiduciary from the claims of third parties, but it can also protect him from the beneficiaries as well. It should be observed, however, that such an exoneration clause (perhaps better known as an exculpatory clause when dealing with beneficiaries) only protects a fiduciary from the beneficiaries when he acts in good faith, and that there is no attempt to excuse him from any acts of willful misconduct.⁷⁸ Assume, for example, that the fiduciary, in good faith, but in an imprudent manner, sells, leases, or mortgages the decedent's estate under the authority given to him either in section 701.19(1) or section 860.01. Because he has acted in good faith, although imprudently, the exoneration (exculpatory) clause would, presumably, prevent liability from attaching against him based upon a cause of action by a beneficiary.⁷⁹ Again, it can be mentioned that sections 701.19(1) and 860.07 have created what can be referred to as a statutory exoneration clause in the case of warranties executed by a fiduciary in a contract to sell, mortgage, or lease the property of the estate.

Third, it would be beneficial both from the estate's point of view and from that of the fiduciary to have inserted in the trust document or will a provision giving the fiduciary the authority to take out both fire and general liability insurance. However, it does not appear to be conditional, as to the fiduciary's power to take out such insurance, that explicit authorization is essential, since the argument can be made that it is his duty to take out such insur-

78. Annot., 83 A.L.R. 616, 617 (1933).

79. Without the presence of such an exoneration (exculpatory) clause, the fiduciary in, for example, the selling of the real property of the estate must act not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property.

In re Estate of Scheibe, 30 Wis. 2d 116, 119, 140 N.W.2d 196, 198 (1966).

ance.⁸⁰ It seems as though taking out fire and general liability insurance should not be confined to the situation in which the fiduciary is actually conducting a business. Tragedies can occur just as readily on an estate which consists of only a home and a small amount of cash.

V. CONCLUSION

It is admitted that a fiduciary, if found to be personally liable in contract or in tort, generally will be able to secure indemnity from his estate for monies of his own used to satisfy these liabilities. Accordingly, a creditor will normally be able to obtain satisfaction either from the fiduciary or from the estate. There is, however, a strong argument favoring prudent drafting techniques in order to avoid this circuitry of action and, thereby, to render the estate directly liable for the normal obligations incident to its existence.

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80. See RESTATEMENT §§ 176, comment *b* at 381, and 247, comment *e* at 625; SCOTT § 264, at 2243.

